No. 4571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

This is a writ of error sued out by J. C. Brooks and George Webb to the District Court of the Northern District of California.

On December 8, 1924, an information in three counts was filed in the Northern Division of the Northern District of California charging plaintiffs in error, George Webb and J. C. Brooks, and also one Leo E. Larke and one Fong Hay with violations of the National Prohibition Act. The counts were is the usual form, the first charging the maintenance of a nuisance on September 24,

1924, at Commercial Bar and Grill, 720 K Street, Sacramento, in the County of Sacramento, in the said Division, and the liquor referred to was described as 2 quarts scotch whiskey, 1½ pint jackass brandy, 3 quarts jackass brandy, 27 sugar barrels containing pint bottles of home brew beer, 2 sugar barrels full pint bottles home brew beer. The second count charged the unlawful possession of the same liquor at the same time and place. The third count charged the unlawful sale of two drinks of whiskey at the same place on September 17, 1924.

At the trial plaintiff in error Brooks was convicted upon all counts; plaintiff in error Webb convicted on the third count, the sale count, and defendant Larke convicted on the second count, the possession count, and the defendant Hay was dismissed.

The court imposed sentences that defendant Larke pay a fine of $500; that defendant Webb be imprisoned for six months in the County Jail, and that defendant Brooks be fined $1000 and be imprisoned for a period of one year on the first count and be imprisoned for a period of six months on the third count, judgment of imprisonment to run consecutively.

The defendant Larke does not prosecute any proceeding in error.

There is a bill of exceptions in the record which indicates the testimony given on behalf of the

government. It does not contain the charge of the court, nor show that any motion for a directed verdict was made at any time by any defendant.

Witness FELT, a Federal Prohibition Agent, testified that on September 17, 1924, he visited the Commercial Bar and Grill, 720 K Street, Sacramento, and purchased intoxicating liquor from defendant George Webb. Witness had a conversation with Webb and "we were discussing the merits of the whiskey and he said that it was Pebble Ford Whiskey; that he sold me and I asked if it was hard to get and he said they had been fortunate enough to get two cases". Witness bought two drinks and paid 50¢ each for them. Witness saw a Chinaman come from the rear of the building with a bottle containing liquid, and pass it to Webb at the bar; he wiped it off and gave it to a gentleman standing on the other side of the bar who put it in his pocket and walked out. Another gentleman was with witness at the time he bought whiskey, who was unknown to him. Witness met him at the place and he just took witness to the bar and requested Webb for some liquor to put in the coffee. "We put liquor in our coffee and took it back to our table and drank it". The bottle the Chinaman gave Webb contained liquid. Witness didn't know what was in the bottle; it was a pint flask not wrapped (Tr. pp. 29-31).

Witness CORY, a Federal Internal Revenue Agent, on September 24, 1924, visited the Commercial

Bar and Grill, 720 K Street, at 9 o'clock in the morning. Witness had a search warrant calling for the search of the Commercial Bar on K Street and went there with Agents Felt and Camplong and an employee of the District Attorney. Witness entered first, followed by the others, and went directly to the rear. As witness entered he saw Webb standing at the far end of the bar, back of the bar, and he made some motions with his hands under the bar (Tr. p. 31). Witness went directly to the rear, made a search of the kitchen, found nothing, walked down the back stairs to the basement, which opens out into a small driveway, which goes on into the alley between K and L Street. Witness found a Chinaman in the basement, asked where the booze was. The Chinaman replied, "there isn't any." He was standing by a partition, board of rough lumber, with a door and padlock on it. Witness told him to get the key and he took the key from a nail around the side of the partition and opened the padlock. Inside witness found 39 barrels, such as are usually used to contain granulated sugar, 27 of the barrels were filled with pint bottles of beer labeled beer, covered with rice hulls; packed that way and evidently had been shipped in that condition. Two barrels were partially empty. There were about 144 bottles in each barrel. Witness identified one of the bottles. Witness took samples from the barrels, had them submitted to a city chemist to analyze it, and it was

found to contain 3.94 per cent alcohol (Tr. p. 32). The Chinaman was taken up stairs and placed in custody of Agent Felt who had taken Webb into custody. Witness went back to the basement and searched. Directly under the bar was a vat, a big redwood tank containing 800 to 1000 gallons of water. From that vat was a pipe coming down from the drain board of the bar and we could smell liquor around the vat, just the odor on top. Agent Camplong then called witness. Camplong was standing in the alley by a small garage—corrugated iron building—which would hold just one car and a car was out in the street pointing toward Seventh Street; defendant Larke was standing there and had a couple of grips in his hands. Camplong said to witness in the presence of Larke, "I have got the stuff". Witness said to Larke, "let me see what you have in the grips". He said, "Have you got a search warrant" but pulled back and witness could hear the bottles rattle in the grip. Witness said, "I put you under arrest right now, the place is being searched by a warrant which is on the bar in the front". The grips were taken away from Larke and opened by witness. In one was found two quarts of scotch whiskey labeled "Caledonia". There was also found one-half pint bottle of jackass brandy, three quart bottles of either jackass brandy or rectified, that is, home made whiskey. Larke was placed under arrest. Further searching witness found back of the bar a

city license issued by the City of Sacramento to conduct the place in the name of J. C. Brooks. The license was left there (Tr. pp. 33, 34).

The bar was located at 720 K Street, about 18 or 20 feet long. One bartender behind the bar. They had glasses and things behind the bar. As to the connection with the 1000 gallon barrel of water in the basement, in the back of the bar there is a drain board, or what you might call a sink, where the water runs off and in back of the sink there is a pipe, a straight pipe, probably 2 inch, through the floor into the basement, and that was cut off a foot above the level of the tank, and about the level of the tank, did not go into the water (witness illustrates). The tank was about 8 feet high, 6 or 8 feet in diameter. It was filled with water estimated to contain 1000 or 800 gallons. It would come down through the pipe and splash into the water.

There were 39 barrels in the basement; 37 full, 2 partially full. They were packed in there with rice hulls between so that they would not break. I believe they had a paper wrapping, that is a strawboard carton wrapping. Witness saw Webb make some motion behind the bar. Didn't know what he was doing. He leaned down a little. The barrel in the basement was directly underneath the spot where Webb was standing. One of the agents found some home brew beer in the ice box behind the bar (Tr. pp. 31-38).

Witness AFLECK, chemist, made an analysis of the sample of liquor and found it to contain 3.94 per cent alcohol by volume (Tr. p. 38).

Witness RINGSTROM, a chemist, made an analysis of Exhibit 2; said it contained distilled spirits, commonly known as jackass brandy and of Exhibit 4 which contained imitation whiskey, meaning colored alcohol with water in it. The alcoholic content was stated from 44.9 to 44.5 by volume and fit for beverage purposes (Tr. p. 39).

Witness CAMPLONG, a Federal Internal Revenue Agent, on September 24, 1924, at 9 o'clock A. M. accompanied Agent Cory, who had a search warrant, and Agent Felt, on a raid. Went to 720 K Street. Omitting details, witness stated he noticed an odor of liquor in back of the bar and with Cory went to the basement and noticed an odor of liquor in the water of a large vat located under a drain leading to the bar. As witness was going out of the door leading to the basement at the back end of the building, he noticed a man going from the kitchen, carrying a handbag, going into a little garage. Witness had seen the man just before, standing by the bootblack stand in front of the swinging doors outside the bar. Witness thereupon watched the man from the door to see what he was going to do. He went around the garage, out of sight. After a few minutes, witness proceeded to the garage. At the corner of the garage witness could hear bottles crackling and hasty move-

ments, there was also buzz of a machine like it was running. Witness went to the front of the garage. Defendant Larke came from the corner and placed a suit case in the back end of the car with another suit case; as he was locking the door of the garage, witness began to question him as to what he had in the suit case. Larke said he was a farmer going to his ranch. Witness said, "Everybody is being detained here as the place is being searched, and every bag and everything else is covered by the search warrant on the property, and that witness would search everything. Thereupon witness took one of the bags from the car, shook it, there was a clinking of bottles. Witness called Agent Cory. Cory demanded the hand bag. Larke wanted to know if he had a search warrant for it. He opened the bag and found liquor in it.

Witness further said, testifying preliminarily, (Tr. p. 28), that when he went to the garage he looked through a crack and saw Larke placing some bottles in the bag.

Witness further said that he only noticed one sink behind the bar but in the basement there were two drain pipes, one from the front and one in the rear. The tank was under the one in the rear of the bar, toward the alley. That tank was full of water. There was no container under the drain in front. It was dry. Didn't show signs of recent use. Witness smelled liquor on the drain in the rear of the bar.

Witness had previously seen Larke outside of the saloon as witness went in. Larke didn't have the suit case at that time. It was about 15 or 20 minutes after that witness saw him going out of the kitchen with the suit case in hand. He had been talking to two men at the bar.

On cross-examination (Tr. p. 44) witness further said, "as near as I could determine, the barrel was located at the drain furthest from K Street, at the southern end of the bar. I investigated the drain over the barrel to determine that it was the drain from the southern end of the bar. There are two drains, one from the front and the other from the rear. The barrel is not placed so as to catch the dripping from the ice box. The drain it is under leads directly to about where the second drain, or where the southern end of the bar is, and is just about under there, at least it was at that time. I am absolutely sure of that".

Witness Felt further testified (Tr. p. 48) that when the raid was made on the Commercial Bar, September 24, 1924, he went behind the bar, found some highproof beer there, the same as admitted in evidence. Witness could smell liquor behind the bar.

The liquor and suitcase so seized were put in evidence as exhibits.

The defendant Webb testified for the defendants. He denied that he sold two drinks of whiskey to Agent Felt at 720 K Street on the 17th of Sep-

tember; denied the conversation respecting the "Pebble Ford" whiskey. Witness was working at the premises at 720 K Street the day the officers, Camplong, Felt, Cory and Brazer came in. Witness said the barrel in the basement was at the upper end of the bar to catch the drippings from the ice box and ice cream freezer. The drain is a small piece of lead pipe broken off above the barrel catching the flow, that is, catching the drippings from the ice box and ice cream freezer. Witness denied ever being in the basement. Witness was asked if he ever sold beer to anybody. Said bottle beer, semi near beer, the beer in the ice box, the porter brought it and asked if it was real beer, witness said "no, I never tasted it, I never drink anything. 25¢ a drink was charged for it; 25¢ for a bottle of beer" (Tr. pp. 54-55).

Witness was hired by Mr. Brooks. Had been working there two years. When witness wanted beer at the bar he told the porter, the Chinaman, to get it and he got it. Witness further testified:

Witness asked if he knew that they kept beer in the basement answered "they must have, the Chinaman brought it up". When witness wanted a certain kind of beer "the Chinaman attends to all of that". When a customer wants the 25¢ beer witness directs him to bring up a bottle of beer without the label. When a customer was paying 25¢ a bottle and calling for beer without the label, witness imagined he was getting better beer. When

witness wanted beer he just told the porter to go down and get some beer and he got any kind of beer. He had certain shelves there for certain kinds of beer. He kept them full. When we were out he kept them full. The bottle beers we sold were Budweiser, Acme and Tacoma, also beer without the labels (Tr. pp. 58-59).

Defendant LARKE testified; he denied that he was in front of the bar when the officers went in there as testified. He leased the place to Mr. Brooks; a Mrs. Godwin owns the property; the bar part was sublet to Mr. Brooks; the license was changed from the name of witness to Brooks on November 15, 1922, that is, when he first started paying rent. Witness said, referring to the incident of having liquor in the garage, that he had it in his house some time and was taking it to a gun club he belonged to. The jackass brandy was some that a fellow wanted to sell witness but he would not have it, but he had it in his grip. Witness said Brooks paid $206 a month rent.

The specifications of error argued in the printed brief of plaintiffs in error are five in number:

(1) That the information is so defective as to be void;

(2) That the court erred in denying a motion to suppress evidence concerning liquors obtained by seizure from defendant Larke;

(3) That the court erred in denying motions made during the trial to strike out the same evidence;

(4) That the court erred in allowing testimony as to a conversation with one defendant in the absence of the other;

(5) That the court erred in denying motions to instruct the jury to find defendant Brooks not guilty for insufficiency of the evidence;

(6) That the Assistant United States Attorney was guilty of misconduct during argument.

ARGUMENT.

I.

THE INFORMATION FOLLOWS APPROVED FORMS AND IS SUFFICIENT BOTH TO CHARGE CRIMES AND TO GIVE THE COURT JURISDICTION.

The information filed against plaintiffs in error charged in separate counts that they maintained a common nuisance; that they unlawfully possessed intoxicating liquors, and that they unlawfully sold intoxicating liquors. That the averments of the several counts are sufficient to charge the particular crimes is well settled.

Young v. U. S., 272 Fed. 967.

The particular objection of the plaintiffs in error to the information, however, results from the apparent circumstance that a certain portion of the

usual affidavit filed with such informations appears to have been misplaced in the document so that it appears previous to the signature of the United States Attorney. Following the signature there is a portion of the affidavit referring to the third count, which, standing alone, might not be considered complete. It is not clear whether the signature of the United States Attorney instead of being placed at the end of the information proper was inadvertently placed on a portion of the affidavit attached to the information; or, whether after the signing of the information, a portion of the affidavit was inadvertently placed so as to appear in the wrong place.

But there was no motion directed to this alleged defect of the information prior to the trial, or at all. There was no demurrer to the information, nor motion to quash upon any ground. If the matter referred to be a defect, it was wholly one of form and, under the provisions of Section 1025 of the Revised Statutes, cannot be availed of after judgment. While an indictment is ordinarily signed by the United States Attorney, there is no statute or inflexible practice requiring that it should be signed by him.

Miller v. U. S., 300 Fed. 529, 536.

When the information is presented to the court by the United States Attorney and allowed to be filed, and when it recites, as it does here, that it is by the authority of the United States Attorney, it

is submitted that it is sufficient to place a defendant on trial, even if not signed at all. It is customary to endorse on an indictment the words "true bill" and for the endorsement to be signed by the foreman, but it has been held in

Frisbie v. U. S., 157 U. S. 160; 39 L. ed. 657,

that such procedure is not indispensable. It is merely a convenient method of informing the court and placing upon record the action of the Grand Jury. It is held in the same case that such a defect is waived, unless objection is made in the first instance, by a preliminary motion, and that, unless objection is so made, the defect is to be considered merely one as to form and cured by the verdict under Section 1025 of the Revised Statutes.

Referring to the contention of plaintiffs in error that owing to the situation referred to the information cannot be deemed to have been properly verified, we deem it sufficient to say that under the later decisions of this court the information need not be verified at all to constitute it a sufficient pleading to place a defendant on trial.

Miller v. U. S., 6 F. (2d) 120;
Jordan v. U. S., 299 Fed. 298;
Wagner v. U. S., 3 F. (2d) 864.

II.

THERE WAS NO ERROR IN DENYING A MOTION TO SUPPRESS EVIDENCE OF INTOXICATING LIQUORS OBTAINED BY THE SEARCH OF DEFENDANT LARKE; INDEED NO SUCH POINT ARISES IN THE RECORD.

It will be seen that at the time when the Prohibition Agents were searching the premises at the Commercial Bar on K Street, and while engaged in the search, one of them saw Larke going out of the kitchen with a hand bag. The Agent followed him to the garage and, looking through a crack, saw him placing some bottles in the bag (Tr. p. 28). As he came out of the garage door, he placed the bag in the car, whereupon Larke was arrested, the grips taken from him and opened and two quarts of scotch whiskey found with a half pint of jackass brandy, three quart bottles of either brandy or whiskey (Tr. pp. 33-34).

It thus results from the facts that there are several answers to counsel's contention.

(a) There is nothing in the record to show the character of the search warrant under which the agents were operating; there is merely the statement of Agent Camplong (Tr. p. 28) "We had a search warrant for the place". And again, the statement (Tr. p. 33) "The place is being searched by a warrant which is on the bar in front".

The record does not show that any motion to suppress evidence or return liquors or quash the search warrant was made anterior to the calling of

the case for trial, nor does the record show the tenor of the search warrant, anything about the showing made to obtain it, or what sort of return was made. We have merely the statements of the agents referred to which would indicate that they were proceeding under a valid search warrant.

(b) More than that, the agents had the right to accost and arrest Larke for unlawful possession and transportation of intoxicating liquor, the crimes being committed in their presence, as they had ample reason to believe and know from the evidence of their senses.

The decision of the Supreme Court of the United States in the case of

Carroll v. U. S., 267 U. S. 132,

sustaining a search under not dissimilar circumstances would be ample authority for anything the agents did in the instant case, as far as any rights of Larke are concerned.

(c) But there is even the further answer to the contention of plaintiffs in error that Larke, who alone would have the right to complain of any unlawful search of his grips, does not complain, nor does he prosecute error from his conviction for the unlawful possession. The validity of a search of his person or effect cannot be questioned by others.

McDonough v. U. S., 299 Fed. 30;
Heywood v. U. S., 268 Fed. 803;
Remus v. U. S., 291 Fed. 501, 511.

In truth the search of the grips in Larke's hands was entirely proper under the search warrant carried by the officers. For it cannot be disputed that when officers go to a place of business with a search warrant to search the place, and they see a bystander surreptitiously going from the back door with a grip to a neighboring garage or building, and follow and see him endeavoring to conceal the very thing sought to be found, then it is clear that the officers have a right to intercept his actions and seize the articles.

III.

THE COURT DID NOT ERR IN REFUSING TO STRIKE OUT EVIDENCE CONCERNING THE LIQUORS OBTAINED FROM LARKE.

In the third specification argued by plaintiffs in error it is contended that the court erred in not striking out as evidence the liquors so obtained upon the arrest of Larke. It is said that the usual rule that the court will not stop a trial to inquire into the collateral issue has no application. But it clearly has such application. There was no anterior motion to quash the search or suppress the evidence or restore the liquors.

The seizure was made on the 24th of September, 1924. The defendants were informed against on December 8, 1924, and arraigned the same day. The trial was had on February 3, 1925. There was no reason why the motion could not have been made before the trial. Under such circumstances it must

be deemed that a case is presented where the court is not required to turn aside and try the collateral

Souza v. U. S., 5 F. (2d), 9;
McDaniel v. U. S., 294 Fed. 769;
Adams v. New York, 192 U. S. 585; 48 L. ed. 575.

The objection to the evidence at the time of the trial thus came too late. That the liquors seized from Larke's grips were relevant evidence as against him cannot be gainsaid.

In addition to this, under the circumstances it would be an admissible inference for the jury to draw that the liquors attempted to be concealed in the garage had a relation to the Commercial Bar with which the other two defendants were shown to be connected.

But in truth the liquors, being relevant to be received in evidence, were not to be held inadmissible as being taken upon any unlawful search, as we have shown in the preceding section of this brief.

IV.

THE COURT DID NOT ERR IN PERMITTING AGENT FELT TO TESTIFY TO CONVERSATION HAD WITH DEFENDANT WEBB AT THE PLACE IN QUESTION WHEN FELT PURCHASED FROM WEBB CERTAIN WHISKEY.

The witness said, "we were discussing the merits of whiskey and he said it was Pebble Ford Whiskey

that he sold me." I asked him if it was hard to get and he said that they had been fortunate enough to get two cases. Witness bought two drinks and paid 50c each for them. The objection was that on behalf of Brooks and Larke the conversation was hearsay.

But that it is admissible as against Webb cannot be disputed. The testimony was thus properly received.

Pappas v. U. S., 292 Fed. 982;
Itoe v. U. S., 223 Fed. 25, 29.

The defendants Brooks and Larke at best would be entitled to an appropriate instruction limiting the evidence as against them, but this they did not request; or it may be inferred, since the charge is not set forth in the bill of exceptions, that the court did properly charge on the subject.

But in truth the testimony was properly receivable as against Brooks. It was shown that Brooks was the proprietor of the bar; that the license stood in his name; Webb was his employee standing behind the bar selling liquor and at least on this occasion sold contraband liquor. If the parties were both principals in the conduct of the common nuisance, as they undoubted were, the acts or statements of one of them during the continuance of the enterprise in aid of carrying on the business were admissible as against the other. The things said by Webb as to the character and quality of the

liquor he was selling to Felt, at the time he sold it, would be statements made in carrying out the enterprise, and thus admissible as against Brooks.

There is no error in receiving the evidence in the first place, even if inadmissible as against Brooks, and, in the second place, it was properly received as against Brooks.

V.

THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT AS AGAINST DEFENDANT BROOKS ON ALL COUNTS; THERE WAS NO MOTION MADE FOR A DIRECTED VERDICT BY BROOKS.

Preliminarily, the contention of Brooks that the evidence was insufficient to justify the verdict as against him cannot now be availed of since he did not make any motion for a directed verdict either at the close of the government's case (Tr. p. 50), or at the close of all of the evidence (Tr. p. 67). Accordingly, the assignment of error that the court erred in refusing to instruct the jury to render a verdict of not guilty as to Brooks has no basis in the record. Under such circumstances the sufficiency of the evidence will not be reviewed by this court, the question not having been raised in the court below.

Paine v. U. S., No. 4576, 6 F. (2d) .....;
Deupree v. U. S., 2 F. (2d) 44;
Lucis v. U. S., 2 F. (2d) 975;
Bilboa v. U. S., 287 Fed. 185.

Defendants would not have the hardihood to contend that there was any miscarriage of justice in the instant case or that for that reason the court should consider the point although not properly raised.

But if the question of the sufficiency of the evidence as to Brooks did arise on the record, his guilt was abundantly shown by the evidence. Counsel advance the circumstance that Brooks was not present at the time of the sale of the liquor to Agent Felt, nor at the time of the search of the premises under the search warrant. But it was shown by the defendants, themselves, by the testimony of Larke, that the premises in question had been leased by the owner to Rainey and Larke and that these tenants by permission of the landlord, had sublet the bar part on September 24, 1924, to the defendant Brooks, and that the license was changed from the name of Larke to Brooks on November 15, 1924 (Tr. p. 61). At the time of the search the agents found back of the bar a city license issued by the City of Sacramento to defendant Brooks (Tr. p. 34).

Defendant Webb, testifying for defendants, stated that Brooks hired him there (Tr. p. 56). Webb had been found by the agents behind the bar on the two occasions referred to. On one of the occasions Webb had sold the agent intoxicating liquors and the agent had seen him pass a bottle containing liquid to a customer (Tr. p. 31).

In addition to this, the arrangement of the premises was significant. It was found that in the basement, directly under the bar, behind a locked partition and apparently in charge of a Chinese employee, 39 barrels, 27 of which were filled with pint bottles of beer and two partially full; there were about 144 bottles in each barrel. Samples of the liquor were taken and analyzed and proven to contain alcohol to the extent of 3.94 per cent by volume (Tr. pp. 32-38). In addition to this a bottle of high proof beer was found behind the bar, the same as the liquor in evidence, the bottle being produced (Tr. p. 48). There was proven a further unusual feature in the construction and arrangement of the bar. There was the usual sink behind the bar but with a drainpipe leading to a large vat full of water, amounting to 300 or 400 gallons, or, as one witness said, to 1000 gallons. The drain extended to within a foot of the water, and the agents detected the smell of intoxicating liquor all about it. It was evidently intended as the jury could have inferred, as an ingenious device to permit, in case of a sudden raid, the rapid dumping and destruction of such small quantities of contraband intoxicating liquor as the parties may have had behind the bar.

Although the defendants undertook to show that this vat was designed to catch the drippings from an ice cream freezer or ice box, this was denied by the agents and the denial found credence with the

jury so that the denial was an additional badge of guilt. And defendant Webb, testifying for defendants, also stated that when he had a customer calling for 25¢ beer, he would have the Chinaman bring up a bottle of beer without a label and when a customer asked for the 25¢ beer witness imagined he was getting a better beer. Webb also stated that the Chinaman had certain shelves there for certain kinds of beer and kept them full. When witness wanted beer he told the porter to go down and get it. From these statements it is seen that Brooks was the conceded proprietor of the bar; that Webb was the bartender employed by him and was found behind the bar selling whiskey and beer; that when Webb wanted beer he would tell the Chinese employee to bring it from the basement and the character of the stock of beer in the basement was shown to be contraband. More than that, the ingenious construction of the tank with reference to the bar and sink was such as to facilitate the rapid concealment of any small amount of liquor that might be in the bartender's hands in the event of a raid. The arrangement was not newly installed; Brooks, as the jury could well have inferred, could not have been ignorant of these permanent features of the bar,—the devices to facilitate concealment and the large stock of contraband beer in the basement. And he being the proprietor of the bar, he was responsible for the way it was carried on and, accordingly, is clearly shown to have been guilty

of unlawful possession and sale of intoxicating liquor and of maintaining the common nuisance. The evidence was sufficient.

Fassola v. U. S., 285 Fed. 378.

VI.

THERE WAS NO PREJUDICIAL MISCONDUCT ON THE PART OF THE ASSISTANT UNITED STATES ATTORNEY IN HIS ARGUMENT.

The record is meager as to the final assignment of error of the defendants. The full arguments are not preserved. Apparently Mr. Johnson, during his argument for the government, happened to state "Mr. Brooks was not called but you heard from Mr. Webb here what he had to say." It is clear that the incidental reference to Brooks was accidental and not hostile. It does not appear that any argument or inference was sought to be drawn from the circumstance that Brooks did not testify. In any event, when counsel for the defendant called the matter to the court's attention, the court said, "you are within your rights; gentlemen of the jury, you will be hereinafter instructed that the failure of Mr. Brooks to take the stand is not in any way to be considered against him; that is his privilege". Following that, the court instructed the jury in manner, we may infer, to the satisfaction of the defendant since he took no exceptions and has not brought up in the bill of exceptions any portion of the charge.

Thus we have the situation that the reference was accidental and not hostile; that it could not have injured defendant Brooks; and that as soon as the matter was brought to the court's attention it properly instructed the jury on the subject, thus acceding to every request of the defendant in error. If error at all, it could not have been prejudicial.

McDonough v. U. S., 299 Fed. 30, 42.

CONCLUSION.

It is, therefore, respectfully submitted that the defendants were shown by ample evidence to have been engaged in carrying on a bar, having a stock of contraband beer which they were selling and at times they sold whiskey. The court did not err in any of its rulings, either in receipt of testimony or in its charge. The case was fairly tried according to the rules of law, and the judgment should be affirmed.

Respectfully submitted,

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